IN THE COURT OF APPEALS OF IOWA

No. 3-1094 / 12-2182
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMY NICOLE SMIDL,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Deborah F. Minot, District Associate Judge.

Amy Smidl appeals her judgment and sentence for operating while intoxicated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Janet M. Lyness, County Attorney, and Jude Pannell, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

DOYLE, P.J.

Amy Smidl appeals her judgment and sentence for operating while intoxicated. We affirm.

I. Background Facts and Proceedings

At approximately 3:20 a.m. on December 16, 2011, Iowa City Police Officer Ashley Hamblin responded to a report of a fight near the Club Car bar. Officer Hamblin located a vehicle that fit the description of that being driven by people involved in the fight and followed it for approximately one block into the parking lot of a gas station. The officer approached the vehicle and identified Amy Smidl as the driver. Smidl's adult daughter and two others were passengers in the vehicle.

As Officer Hamblin spoke to Smidl "about the whole argument situation," she noticed Smidl smelled of alcohol and had bloodshot, watery eyes. Smidl admitted she had consumed "a couple beers." Officer Hamblin also noticed Smidl had blood on her hand, which Smidl denied. But when Officer Hamblin pointed out the blood, Smidl stated, "Oh, I guess I do."

After Smidl failed field sobriety tests, Officer Hamblin asked Smidl "several times" to take a preliminary breath test (PBT). Smidl responded she "wasn't sure she should take it because she didn't know if she would blow over the legal limit or under." As Smidl remained equivocal about taking the PBT, her daughter yelled from the vehicle, "Just take it. Just take the breath test." Smidl repeatedly said, "I just want my daughter to drive me home" and would not answer the officer's request to take the test. Officer Hamblin eventually deemed Smidl's responses a refusal. Smidl resisted slightly as Officer Hamblin placed her under

arrest. At the police station, Officer Hamblin read Smidl the implied consent advisory and requested a breath specimen. Smidl refused.

The State charged Smidl with operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2011). Smidl pled not guilty. A Johnson County jury found Smidl guilty following a one-day trial. The district court sentenced Smidl to serve two days in jail with credit possible for successful completion of an OWI weekend program and to pay a fine of $1250. Smidl appeals, raising two claims of ineffective assistance of counsel.

II. Ineffective Assistance of Counsel

Smidl contends her trial counsel was ineffective in failing to (1) object to evidence of her PBT refusal, and (2) object to evidence of her daughter's comments urging her to take the PBT. We review claims of ineffective assistance of counsel de novo. *See State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013). To prevail, Smidl must show that (1) counsel breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

If we can determine from the existing record that it will be impossible for Smidl to establish either prong of the *Strickland* test, we will affirm her conviction without preserving the claim. *See State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004). But if it is necessary to more fully develop a factual record, we will preserve the claim for a possible postconviction relief action. *See id.* Neither party urges us to preserve Smidl's claims. We find the record in this case is sufficient to allow us to address them on direct appeal.

A. *Preliminary breath test refusal*

Smidl contends her trial counsel was ineffective in failing to object to evidence that she refused to take a preliminary breath test. According to Smidl, this evidence was inadmissible and allowed the State to argue she "was given more than one chance to show she was sober." Smidl claims she was prejudiced by counsel's failure "because the State bootstrapped her refusal of the PBT to her refusal of the chemical test at the station." Smidl's contention, albeit creative, is not persuasive.

Smidl correctly points out a PBT is a screening test and the results of that test are inadmissible. Indeed, section 321J.5(2) provides, "The results of this preliminary screening test [PBT] . . . shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter." *See State v. Massick*, 511 N.W.2d 384, 388 (Iowa 1994) (recognizing the results of a preliminary breath test are inadmissible). Further, testimony by officers that the result of a PBT indicated the presence of alcohol is reversible error. *State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987). Here, Officer Hamblin did not testify to the results of a PBT nor could she have, because no PBT was administered. Officer Hamblin's general statements about Smidl's refusal to take a PBT were not statements about the results of a PBT.

Smidl claims section 321J.5(2) should be interpreted as disallowing evidence of a defendant's *refusal* to submit to a PBT. We disagree. We believe the language of the statute is plain and the meaning of that language is clear. *See State v. Haberer*, 532 N.W.2d 757, 759 (Iowa 1995) ("We are not permitted to search beyond the express terms of a statute when the language of the statute

is plain and the meaning of the language is clear."). Results of a PBT are inadmissible except to prove that a chemical test was properly requested. *See* Iowa Code § 321J.5(2). Evidence of a decision to take a PBT or a refusal to submit to a PBT, however, is not deemed inadmissible under section 321J.5(2). *See id.*; *see also Gavlock v. Coleman*, 493 N.W.2d 94, 96 (Iowa Ct. App. 1992) (observing that evidence that a defendant submitted to a PBT is admissible when no reference is made to the results of the test). We conclude the statute does not prohibit evidence of a person's refusal to submit to a PBT.

Furthermore, the State argues that Smidl's refusal to take the PBT indicated proof of Smidl's consciousness of guilt. Admissions may be implied by the conduct of a defendant subsequent to a crime when such conduct indicates a consciousness of guilt. *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995). Here, Smidl admitted to drinking beer. The officer observed Smidl smelled of alcohol and had bloodshot, watery eyes. Smidl failed field sobriety tests. Although the specific question apparently has not been addressed by our supreme court, we note many states admit evidence of a person's refusal to submit to a field sobriety test, including a PBT, as consciousness of guilt and substantive evidence of guilt.[1] Under the circumstances presented here,

[1] *See Johnson v. State*, 987 S.W.2d 694, 698 (Ark. 1999) (stating a defendant's refusal to take a breath or field sobriety test indicates consciousness of guilt); *State v. Taylor*, 648 So. 2d 701, 704 (Fla. 1995) (holding a defendant's refusal to submit to a field sobriety test is admissible because it is relevant to the defendant's consciousness of guilt); *Hoffman v. State*, 620 S.E.2d 598, 600 (Ga. Ct. App. 2005) (finding a defendant's refusal to submit to a field sobriety test is admissible as circumstantial evidence to prove the driver was impaired); *McCormick v. State*, 65 A.3d 178, 184 n.6 (Md. Ct. Spec. App. 2013) (citing numerous cases that have reached similar findings); *State v. Mellett*, 642 N.W.2d 779, 788 (Minn. Ct. App. 2002) (holding that the trial court did not abuse its discretion in admitting the defendant's refusal to take a field sobriety test); *State v. Sanchez*, 36 P.3d 446, 449 (N.M. Ct. App. 2001) (stating that the State can use the

evidence of Smidl's refusal to submit to a PBT was admissible to show her consciousness of guilt.

We conclude trial counsel did not have a duty to object to the testimony regarding Smidl's refusal to submit to a PBT.[2] *See State v*. *Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) ("[C]ounsel has no duty to raise an issue that has no merit.").

In any event, even if counsel had raised the claim, Smidl has failed to show a reasonable probability the result of the proceeding would have been different.[3] *See State v*. *Utter*, 803 N.W.2d 647, 654 (Iowa 2011) ("To prove

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driver's refusal to take a field sobriety test as circumstantial evidence of consciousness of guilt); *State v. Filchock*, 852 N.E.2d 759, 768 (Ohio Ct. App. 2006) (stating that an arresting officer may consider the driver's refusal to submit to a field sobriety test in determining whether probable cause to arrest exists); *Jones v. Commonwealth*, 688 S.E.2d 269, 272-73 (Va. 2010) (holding that a driver's refusal to submit to a field sobriety test is circumstantial evidence "tending to show the driver's awareness that his consumption of alcohol would affect his ability to perform such tests" and that an officer may consider the driver's refusal in his assessment of probable cause); *see also State v. Ferm*, 7 P.3d 193, 205-06 (Haw. Ct. App. 2000) (holding that the admissibility of a defendant's refusal to take a field sobriety test did not violate the defendant's Fifth Amendment right to refrain from incriminating himself); *State v. Hoenscheid*, 374 N.W.2d 128, 129-30 (S.D. 1985) (same); *Seattle v. Stalsbroten*, 978 P.2d 1059, 1061 (Wash. 1999) (same).

We further note that this court, in an unpublished opinion, suggested a refusal to perform filed sobriety tests need not be suppressed when the accused was neither in custody nor was there an interrogation. *State v. Murphy*, No. 07-0924, 2008 WL 942276, at *2 (Iowa Ct. App. Apr. 9, 2008). A request to perform field sobriety tests does not amount to interrogation. *Id*. Additionally, evidence of refusal to submit to a PBT may be a predicate to establishing proper invocation of implied consent. *See* Iowa Code § 321J.6(1)(c) (invoking implied consent to test procedures may be invoked when a peace officer has reasonable grounds to believe a person was operating a motor vehicle in violation of section 321J.2 or 321J.2A *and* the person has refused to take a preliminary breath screening test).

[2] In addition to its contention that counsel had no duty to object because the evidence was admissible, the State alternatively claims counsel did not breach a duty because "counsel strategically chose to use the evidence." In light of our conclusion on the breach-of-duty prong of the *Strickland* analysis, we need not consider counsel's trial strategies.

[3] Evidence of Smidl's refusal to submit to a chemical breath test was admissible under section 321J.16.

prejudice resulted from trial counsel's failure to perform an essential duty, an accused must establish 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" quoting *Strickland*, 466 U.S. at 694). We find no basis to reverse Smidl's conviction on this claim.

B. *Hearsay statements by Smidl's daughter*

Smidl contends her trial counsel was ineffective in failing to object to evidence of her daughter's comments urging her to take the PBT. According to Smidl, this evidence was inadmissible hearsay that the State offered for the purpose of arguing Smidl was under the influence. Smidl points out the following portion of the State's closing argument to support her claim:

> [Smidl] also wouldn't listen to her daughter, her daughter who didn't know how intoxicated the defendant was you heard on the video kept saying, "Mom, take the test. Mom, take the test." All she had to do was take the test and go home if she was sober, but she chose not to. Her daughter, who didn't know how drunk she was, advised her to do it, and in fact she said she would do it, and we all know that that didn't happen.

In response, the State claims this evidence was not hearsay. We agree. The evidence was not offered for the truth of the matter asserted. *See* Iowa R. Evid. 5.801(c) (defining hearsay as a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted). Rather, it was offered to show Smidl's reaction to her daughter's statements, i.e., that her refusal to take the test despite her daughter's urging showed consciousness of guilt. *See State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1986) ("Statements that otherwise would be considered hearsay, offered not for the purpose of proving the truth of the statements but rather

offered to help explain relevant conduct taken in response to them, are not hearsay and are not excludable as such."). Further, the truth of the statements was irrelevant. *See id.* at 705-06. We conclude trial counsel did not have a duty to object to the testimony regarding Smidl's daughter's statements. *See Dudley*, 766 N.W.2d at 620 ("[C]ounsel has no duty to raise an issue that has no merit.").

Even if counsel had raised the claim, Smidl has failed to show a reasonable probability the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. The challenged evidence was merely cumulative of other evidence introduced at trial without objection, including the audio/video recording from Officer Hamblin's patrol car, from which the jury could hear Smidl's daughter make the statements of which Smidl now complains. *See State v*. *McGuire*, 572 N.W.2d 545, 547 (Iowa 1997) ("[T]he court will not find prejudice if substantially the same evidence has come into the record without objection."). We find no basis to reverse Smidl's conviction on this claim.

We affirm Smidl's judgment and sentence for operating while intoxicated.

AFFIRMED.